IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

FRIDAY, THE 24TH AUGUST 2007 / 2ND BHADRA 1929

WP(C).No. 24210 of 2007(F)

PETITIONER:

M/S.HARRISONS MALAYALAM LTD.,
BRISTOW ROAD, WILLINGDON ISLAND,
COCHIN-682 003, REPRESENTED BY ITS
MANAGER-LEGAL, MR.M.V.H.MENON.

BY ADV. DR.RAJEEV DHAVAN (Sr.)
SRI.A.M.SHAFFIQUE
SRI.E.K.NANDAKUMAR
SRI.JAYASANKAR A.K.
SRI.ANIL D.NAIR

RESPONDENTS:
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1. **STATE OF KERALA, REPRESENTED BY ITS**
   CHEIF SECRETARY TOO GOVERNMENT, SECRETARIAT,
   THIRUVANANTHAPURAM.

2. **INSPECTOR GENERAL OF POLICE,**
   TRIVANDRUM RANGE, NANDAVANAM,
   THIRUVANANTHAPURAM.

3. **SUPERINTENDENT OF POLICE,**
   PATHANAMTHITTA.

4. **DEPUTY SUPERINTENDENT OF POLICE,**
   PATHANAMTHITTA.

5. **CIRCLE INSPECTOR OF POLICE,**
   PATHANAMTHITTA.

6. **SUB INSPECTOR OF POLICE,**
   PATHANAMTHITTA.

..2/-

7. ACHUTHAN,STATE COMMITTE MEMBER,
SADHU JANA VIMOCHANA SAMYUKTHA VEDI,
PATHANAMTHITTA.

8. T.S. SARASWATHI, STATE COMMITTE MEMBER,
SADHU JANA VIMOCHANA SAMYUKHA VEDEI,
PATHANAMTHITTA.

BY ADV. SRI.A.X.VARGHESE for R7 & R8
BY GOVERNMENT PLEADER SRI. SALIM P.A.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 16/08/2007, THE COURT ON 24/08/2007 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE LETTER DTD. 4/08/07 SENT BY THE PETITIONER TO THE CHIEF MINISTER WITH COPY MARKED TO THE HOME MINISTER AND RVENUE MINISTER.

EXT.P2: COPY OF THE LETTER DTD. 4/08/07 SENT BY THE PETITIONER TO THE DISTRICT COLLECTOR PATHANAMTHITTA WITH COPY MARKED TO THE CHIEF SECRETARY TO GOVERNMENT AND OTHER OFFICIALS.

EXT.P3: COPY OF THE LETTER DTD. 4/08/07 SENT BY THE PETITIONER TO THE 2ND RESPONDENT.

EXT.P4: COPY OF THE LETER DTD. 4/08/07 SENT BY THE PETITIONER TO THE SUPERINTENDENT OF POLICE WITH COPY MARKED TO THE 3RD RESPONDENT WITH THE COPY MARKED TO THE 2ND RESPONDENT.

EXT.P5: COPY OF THE LETTER DTD. 4/08/07 SENT BY THE PETITIONER TO THE 6TH RESPONDENT WITH COPY MARKED TO THE RESPONDENTS 2, 3 AND 5.

EXT.P6: COPY OF THE LETTER DTD. 5/08/07 SENT BY THE PETITIONER TO THE CHIEF MINISTER WITH COPY MARKED TO THE HOME MINISTER AND REVENUE MINISTER.

EXT.P7: COPY OF THE LETTER DTD. 5/08/07 SENT BY THE PETITIONER TO THE 3RD RESPONDENT WITH COPY MARKED TO THE HOME MINISTER AND I.G. OF POLICE, TRIVANDRUM RANGE.

EXT.P8: COPY OF THE LETTER DTD. 5/08/07 SENT BY THE PETITIONER TO THE 3RD RESPONDENT WITH COPY MARKED TO THE RESPONDENTS 2 AND 5.

EXT.P9: COPY OF THE FIR NO.601/2007 DTD. 5/08/2007 REGISTERED BY THE 6TH RESPONDENT.

..2/-

EXT.P10: COPY OF THE NEWSPAPER REPORT APPEARED IN 'THE HINDU' DTD. 6/08/07.

EXT.P11: COPY OF THE NEWSPAPER REPORT APPEARED IN 'THE HINDU' DTD. 7/08/07.

7TH RESPONDENT'S EXHIBITS:

EXT.R7(A): COPY OF THE NOTICE DTD.11/08/07 PUBLISHED BY THE PETITIONER.

EXT.R7(B): COPY OF THE COMPLAINT GIVEN BY THE OWNER OF THE KUMBAZHA ESTATE DTD. 13/08/07.

EXT.R7(C): COPY OF THE GOVERNMENT ORDER G.O.(RT) NO.4033/06/RD DTD. 30/09/06.

EXT.R7(D): COPY OF THE REPRESENTATION DTD. 15/07/07.

/TRUE COPY/

P.S.TO JUDGE

KSS

K.BALAKRISHNAN NAIR &

HARUN-UL-RASHID, JJ.

W.P.(C) NO. 24210 OF 2007-F

Dated 24th August, 2007.

JUDGMENT

Balakrishnan Nair, J.

The petitioner is a Public Limited Company. Hundreds of persons under the leadership of respondents 7 and 8 have encroached into a rubber estate of the petitioner company illegally. Though, police and other officials were moved, no help was forthcoming. Hence this writ petition, seeking a writ of mandamus to the police to extend help to the petitioner to evict the encroachers and for consequential reliefs.

2. The brief facts of the case as stated by the petitioner are the following: The petitioner company owns rubber and tea estates in various parts of Kerala and Tamil Nadu. In Pathanamthitta district in Kerala, it owns Kumbazha rubber estate, having an extent of 1048 hectares. Field No.9 of Kurumpatty division of the said estate is fully covered by rubber plants, which are being tapped regularly. While so, at 10.30 p.m on

4.8.2007 several hundreds of people under the leadership of respondents 7 and 8 encroached into the said field No.99 of the estate and occupied the entire area. They are remaining there in the temporary sheds put up by them. The encroachers are the members of Sadhu Jana Vimochana Samyukta Vedi, which, according to the petitioner, is an unregistered organisation. On coming to know of the encroachment, the Circle Inspector of Police, Pathanamthitta was informed. Though, the police reached the estate, for want of sufficient strength, they were unable to do anything. The Superintendent of Police was also informed, but he expressed his inability to interfere in the matter during the night. On the next day morning, it was found that the entire 107 acres of land in field No.99 was fully occupied by the encroachers. Regarding the encroachment, the Chief Minister, the Home Minister and the District Collector, Pathanamthitta were informed. Ext.P1 is the representation dated 4.8.2007 submitted to the Chief Minister, the copies of which were forwarded to the Home Minister and Revenue Minister. Ext.P2 dated 4.8.2007, is the representation filed before the District Collector, who is also the District Magistrate. Ext.P3 representation was filed before the Inspector General of Police, Thiruvananthapuram Range. Ext.P4 is the representation before the Superintendent of Police, a copy of which was marked to the I.G of Police, Thiruvananthapuram Range

also. Ext.P5 is the representation filed before the S.I of Police, with copy to the C.I of Police.

3. When the workers of the estate assembled in the area and tried to persuade the encroachers to go out, they were pelted with stones by the encroachers. A lady worker was injured and she was held captive by the encroachers. She was later released on the intervention of the police. When there was no response from the part of the authorities, the petitioner again addressed Ext.P6 representation dated 5.8.2007 to the Chief Minister. The Superintendent of Police was again moved by Ext.P7, copies of which were marked to the Home Minister and the I.G of Police, Thiruvananthapuram Range. A further representation Ext.P8 dated 5.8.2007 was sent to the District Superintendent of Police with copies to the C.I of Police and the I.G of Police. In the meantime, the S.I of Police registered Crime No.601/2007 on 5.8.2007 against the activists of Sadhu Jana Vimochana Munnani for the offences under Sections 143, 147, 149, 447 and 427 of the I.P.C. Newspapers reported about the encroachment. Exts.P10 and P11 are the reports which appeared in "The Hindu" daily dated 6.8.2007 and 7.8.2007 respectively.

4. Since the date of encroachment, the staff and workers of the petitioner are not able to enter into Field No.99 for tapping or other

agricultural operations. Though some police force was sent to the area, they are remaining mute spectators of the illegal activities of the encroachers. The petitioner is unable to protect its property from the encroachment made by respondents 7 and 8 and their supporters. The lives of the employees of the petitioner are in grave danger. The actions of the encroachers are criminal offences. The police have a duty to interfere in the matter and extend protection to the petitioner. So, the petitioner prays for the following reliefs:

> "(i) issue a writ, order or direction in the nature of mandamus directing respondents 1 to 6 to remove the illegal encroachment caused by respondents 7 and 8 and their men from the petitioner's Kumbazha Estate at Pathanamthitta District, to provide adequate police protection to the petitioner to prevent respondents 7 and 8 and their men from continuing with their illegal encroachment and enable the petitioner to run its Kumbazha Estate.
>
> (ii) issue an interim direction directing the respondents 1 to 6 to remove the illegal encroachment caused by respondents 7 and 8 and their members and provide adequate police protection to the petitioner to function its Kumbazha Estate."

5. The respondents 7 and 8 have filed a counter affidavit. They dispute even the very title of the petitioner to the estate. They submit, the Kumbazha Estate has been taken on lease by the petitioner from a private party and the term of the lease has already expired. So, the petitioner is not the owner of the Estate and therefore, it has no locus standi to maintain the

writ petition. In support of the above submission, they produced Ext.R7(b) letter addressed by one Mr.Mohandas, who is stated to be the owner of the Estate, to the District Superintendent of Police. Translation of the said letter reads as follows:

"Sir,

The land in the possession of the Harrisons Malayalam Company in Malayalapuzha village was given on lease by my late grand father Uzhuthiraru Uzhuthiraru in 1913. I have received rent from the Company up to 1996. Since the lease conditions were violated, notice has been issued to the Company, terminating the lease and also to restore possession of the same to me.

It is understood that without my knowledge or consent, people have entered the land and have put up huts. It is requested to evict the encroachers. But, they may not be evicted by use of force. I am ready to discuss with them and also the Government. If the Chief Minister requests, I am ready to surrender a portion from this land. As the owner of the property, I will not recognize any discussion held in my absence.

It is requested to evict the encroachers and protect my property.

Yours faithfully,
Sd/-
Mohandas."

The respondents 7 and 8 submit that their followers are not encroachers. They are landless persons agitating for distribution of land to them. 500 families have entered the Kumbazha Estate, demanding the Government to take over the Estate from private parties and distribute it to the landless

members of the Scheduled Caste and also to other landless and homeless people. If the Government do not fulfill the promises held out by it and try to evict the activists of Sadhu Jana Vimochana Samyukta Vedi camping in Kumbazha Estate by use of force, there is every chance of mass suicide of the occupants of the said Estate. They deny the allegations and the averments in the writ petition. According to them, the plantation workers of the petitioner threatened the occupants. They attacked the persons camping in the Estate by pelting stones and as a result, 11 occupants, who were injured, have been admitted in the Kottayam Medical College Hospital on 5.8.2007. A battalion of police led by the Deputy Superintendent of Police is camping in the area. So, the police is taking all possible steps to evict them. The respondents 7 and 8 also point out that the Company is in possession of 8783.96 acres of excess land, as evident from Ext.R7(c) Government order dated 30.9.2006. The Government have constituted a high level committee headed by the Commissioner of Land Revenue, to look into the matter of possession by the petitioner of excess land. They further point out that they have already filed Ext.R7(d) representation before the Government, claiming various reliefs and when the said representation was not considered and the reliefs not granted, the present action was taken. The Government have a duty to implement the mandate of Article 46 in

Chapter IV of the Constitution of India. Since the Government have failed to perform its duty, they submit, their members have entered the property held by the petitioner. The petitioner has not filed any reply affidavit.

6. Heard the learned counsel on both sides. The learned senior counsel Dr.Rajeev Dhawan appearing for the writ petitioner after referring to the facts of the case, submitted that the police have to perform their duty to protect the property of the petitioner and the lives of its employees. He pointed out that under Section 129 of the Cr.P.C., the District Magistrate and also the officer in charge of a Police Station have the power to command any unlawful assembly to disperse. If the members of the said assembly do not obey them, the said officers can disperse the assembly by use of force. The learned senior counsel also brought to our notice Section 130 of the Cr.P.C., which empowers the Executive Magistrate to disperse any unlawful assembly by using armed forces, for public security. The Executive Magistrate has power to issue prohibitory orders under Section 144 of the Cr.P.C., to prevent danger to human life and disturbance of public tranquility. Reference was also made to Section 149, which mandates every police officer to prevent the commission of cognizable offences. The learned senior counsel also took us through the various relevant provisions under the Kerala Police Act, 1960. Special reference was made to

Sections 4, 5 and sub-sections (b), (c), (d) and (q) of Section 29. Section 4 says that the administration of the police in the State shall be vested in the Inspector General of Police, subject to the control of the Government. Section 5 says that the police force within the local jurisdiction of a District Magistrate shall be in the general control and direction of him. Section 29 enumerates the duties of police officers. Sub-section (b) of Section 29 makes it the duty of the police among other things to prevent commission of cognizable offences. Sub-section (c) mandates that it is the duty of the police to preserve peace. Sub-section (d) says that it is the duty of the police to prevent public nuisances. Sub-section (q) requires the police officer to prevent entry without reasonable excuse into dwelling houses or other buildings and on lands attached to them.

7. The learned senior counsel for the petitioner pointed out that except registering a crime, the police has done nothing to prevent breach of peace or avert the commission of cognizable offences. The police have failed to perform their statutory duties. So, this Court may interfere in the matter, it is submitted. He, in support of his submissions, relied on the decision of the Apex Court in **Sanjay Sitaram Khemka v. State of Maharashtra** [(2006)5 SCC 255] and also the decisions of this Court in

Shahul Hameed v. Narayana Pillai (2003(3) KLT 536), **Midland Rubber & Produce Co. Ltd. v. Superintendent of Police** (1998(2) KLT 365) and **Raghavan v. Superintendent of Police** [1998(2) KLT 732 FB]. The learned senior counsel also made reference to the decision in **Vineet Narain v. Union of India** [(1998)1 SCC 226],wherein the Apex Court took an active supervisory role in guiding investigation into the corruption of men in high places. He submitted that the petitioner is in lawful possession of the Kumbazha Estate and it has got every legal right to protect it from the encroachers, who are total strangers and who have no claim whatsoever over it.

8. The learned Government Pleader Mr. P.A. Salim, upon instruction, submitted that two criminal cases have already been registered by the police on information of cognizable offence being lodged with the Station House Officer. He also pointed out that thousands of people are involved in the encroachment and therefore, the police cannot use excessive force to evict them. It may engender more serious law and order problems, instead of solving the existing one. Against the encroachers the petitioner has an effective alternative remedy before the civil court, it is submitted.

9. Mr.A.X. Varghese, learned counsel appearing for respondents 7

and 8 submitted that more than 8000 acres of land in the possession of the petitioner belongs to the Government. To evict the petitioner from the said land and distribute the same to the landless members of the Scheduled Caste and adivasis, a peaceful agitation is launched. They have peacefully entered the Government land in the possession of the petitioner and are squatting there. They are not causing any obstruction to the agricultural operations or tapping of rubber. It is a peaceful non-violent agitation to persuade the Government and other authorities to take over the Government land in the possession of the petitioner. They have no intention whatsoever to cause any damage or commit waste or cause any bodily harm to the employees. The said respondents also point out that the Government have a duty under Article 46 of the Constitution to promote with special care the economic interest of weaker sections of people, particularly of Scheduled Castes and Schedule Tribes. The learned counsel for the respondents 7 and 8 also relied on the decision of the Apex Court in **P.R.Muralidharan v. Swami Dharmananda Theertha Padar** [(2006)4 SCC 501]. He also referred to the decision in **Sanjay Sitaram Khemka v. State of Maharashtra** [(2006 (5) SCC 255].

10. The members of the Sadhu Jana Vimochana Samyukta Vedi,

which means "joint forum for liberation of poor people", have no right over the property in the possession of the petitioner. Even if 8000 acres of surplus land is in the possession of the petitioner Company, the members of the Vedi will not have any special claim over it. Of course, when the Government take over the land and invite applications from eligible persons for assignment of the surplus land so taken, if they are eligible, they can also apply. They have only a claim to be considered for assignment of surplus land, when it is taken over by the Government. The encroachers, even if they are eligible, cannot be, directly, assigned the land, as the same will be resulting in injustice to several persons who may be more eligible, but who may not have chosen to come and encroach into the property.

11. It is true, the encroachers have every right to hold peaceful demonstrations and public meetings, to highlight the inaction of the Government and for persuading it to take the surplus land, if any, in the possession of the petitioner. Forming organizations for the upliftment of the downtrodden and holding demonstrations or public meetings are protected by the fundamental rights of the members of the Vedi under Article 19(1)(a), (b) and (c) of the Constitution of India. Those sub-Articles guarantee freedom of speech and expression, right to assemble peacefully without arms and the right to form associations or unions. But, they cannot

take law into their hands. Of course, modern jurists recognize the right of citizens to disobey the laws, which they think are unjust and unconstitutional. The right to take the said risk and the discretion to disobey a law, are recognized and referred to in all modern books on jurisprudence. See the views of the following learned authors:

> **Hilaire Barnett** (Constitutional and Administrative Law):
> "The question which then arises is whether the individual has a 'right' to disobey the law? A Government true to democratic percepts of representativeness and fairness must be sensitive to demands for change. If it fails in that regard it is at least arguable that demands for change, while entailing technical breaches of the law, should be accommodated within the constitutional framework."
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> **R.W.M. Dias** (Dias Jurisprudence - 5th Edition): "Civil disobedience has become a problem in many societies in recent times, and changes have been brought about in consequence. The question is how far, if at all, disobedience can be accommodated within a theory of law. On the face of it, there is an obvious contradiction here; but if law is thought of in a continuum and ability to change is regarded as a condition of the continuity of law, then disobedience could, within limits, be included among the phenomena inducing legal change."
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> **Edgar Bodenheimer** (Jurisprudence): "It may, however, happen that an oppressive regime enacts rules into law which utterly defy all civilized standards of decency. Suppose, for example, a Government orders the extermination or sterilization of an unpopular religious, racial, or national minority, sanctions the lynching of persons by mobs, commands (like King Herod in the New Testament) the killing of innocent children, or compels persons at the threat of torture to inform on close relatives who have criticized the Government. If (as will usually be the case under a tyrannical regime) no bona fide legal procedures for challenging the authority of such utterly iniquitous laws are available, a right to resist the application and execution of such commands ought to

> be accorded to legal officials as well as private citizens. The exigencies of legal security demand, however, that his right be limited to extreme and inextricable situations in which an outrageous wrong is being committed by the Government. Furthermore, the person making use of the right of resistance must be held to the risk of having misjudged the stringent prerequisites for the legitimate exercise of this right."
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> **Ronald Dworkin** (Taking Rights Seriously): "In a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even though he would like some of them changed. He owes that duty to his fellow citizens, who obey laws that they do not like, to his benefit. But this general duty cannot be an absolute duty, because even a society that is in principle just may produce unjust laws and policies, and a man has duties other than his duties to the State. A man must honour his duties to his God and to his conscience, and if these conflict with his duty to the State, then he is entitled, in the end, to do what he judges to be right. If he decides that he must break the law, however, then he must submit to the judgment and punishment that the State imposes, in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral obligation."

The above concept of discretion to disobey the laws has been dealt with by our Apex Court in **Nawabkhan v. State of Gujarat [(1974)2 SCC 121]**. The relevant portion of the said judgment reads as follows:

> "Illegal acts of authorities, if can be defied on self-determined voidness, startling consequences will follow, as the High Court apprehends. A detinue will beat back, a builder will put his wall on the forbidden line, a court officer will meet with physical resistance, all because the order is, on the view of the affected party, a nullity and is late proved so before a court. Not every action by a Government agency carries with it the force of law and naturally what should he do if he concludes that the action is invalid? Should he disobey, face penal proceedings and get his violation legitimated by Court? Is there no alternative to breaking the law or order to expose the lawlessness of the

law or order? A recent book ('Discretion to Disobey' by Kadish and Kadish) establishes this line of thought from Benjamin Curtis, a former Supreme Court Justice, who argued to the Senate on behalf of President Andrew Johnson (sic) during the latter's impeachment trial a century ago:

'I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizen or public officers. If this is the measure of duty there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to senators that not only is there no such rule of civil or moral duty, but that it may be and has been a high and patriotic duty of a citizen to raise a question whether a law is within the Constitution of the country.'

On this view it is almost as though the Constitution contained the words to be found in the constitution of one contemporary German State:

'It is the right and duty of every man to resist unconstitutionally exercised public power':

More apposite to the present case are these remarks of the same authors:

'If a policeman, in the exercise of his office, orders a Black person to leave a park in a Southern town, is the citizen obliged to obey the policeman's order and wait until later to invoke some remedy to challenge its validity? Can the citizen be constitutionally convicted of some crime based on his refusal to obey the policeman's order, even if a court should later determine that the order was unconstitutional? Not long ago the Supreme Court considered just this case. It had little difficulty reaching a decision. The order was found to be an unconstitutional violation of the defendant's rights first because it was designed to enforce a

racial discrimination in the park, and second because it was based on the possibility of unlawful troublemaking by others rather than on any wrongdoing by the defendant. So much was sufficient to require a reversal of the defendant's conviction: 'Obviously, ...one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution'. The policeman's order was treated like a statute: obedience to an unconstitutional order of an official is not required, even though the order has not yet been ruled invalid by a Court. The citizen is at liberty to make his own judgment of the order's validity and to act accordingly. If he turns out to be wrong, of course, he is answerable. But if he turns out to be right, he not answerable in any way – not for disobeying the order, since the order was invalid, and not for undertaking himself to decide in advance that the order was invalid, since he was at liberty to make that decision.

Where the situation escalates into active resistance and perhaps the use of force, typically involved in cases of resistance to unlawful arrest or to the execution of some process, such as serving a search warrant, the interest in the physical welfare of the policemen and the citizen (as well as others) may often produce a contrary answer. Indeed, an increasing number of jurisdictions afford no right to resist an arrest made under colour of authority, even if the arrest is later determined to be invalid. The citizen is obliged in this circumstance to yield and submit his case to the Courts. As the Model Penal Code concludes: 'It should be possible to provide adequate remedies against illegal arrest, without permitting the arrested person to resort to force – a course of action highly likely to result in greater injury even to himself than the detention.'

The law in this area is full of alarming conundrums hardly resolved by academic writing or judicial dicta." (V.R.Krishna Iyer, J.).

12. We notice with respect the above views, but we are of the opinion that if a person disobeys a law, whatever be the motivation for the

same, the law must take its own course. The police have a duty in the light of the provisions in the Criminal Procedure Code and the Kerala Police Act referred to by the learned senior counsel for the petitioner, to maintain law and order and avert breach of peace. Threat to the lives of the citizens has also to be averted. If a large group of persons having no semblance of right over a property encroach into it and commit mischief, the owner is entitled to get the help of the police to protect his property. In such circumstances, the filing of a civil suit is not an efficacious remedy. So, when the police are under such a duty and it is shown that they have failed to perform its duty in this regard, then, normally, a writ in the nature of mandamus will be issued by this Court.

13. But, in this case, a few thousands of people, who are apparently landless, are involved. They also say, they will commit self immolation, if force is used to remove them. In that context, the police has to act carefully and tactfully to deal with the situation. The police are not supposed to yield to the pressure of the masses and abandon their duty to maintain law and order. But, the point to be decided is whether the police should be given operational freedom in planning how to evict the encroachers or we should force their hands. Normally, this Court should explain the duty of the police and leave it to the police act on their own. But, in extreme cases

where there is palpable failure of duty, this Court can and must step in and issue positive directions. The learned authors H.W.R. Wade and C.F.Forsyth in their Administrative Law, 9th Edition, explained this principle in the following words:

> "In the case of the police, to whom mandamus may issue if they refuse to perform their duty, the court may prefer to explain their duty to them in general terms and leave them to act on their own responsibility in any particular situation."

The leading English decision on issuance of writ of mandamus to the police is that of the Court of Appeal in **Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn** [(1968)2 QB 118]. When a public spirited citizen moved the court complaining that the police is not taking effective steps against the offenders under the Betting, Gaming and Lotteries Act, the Court of Appeal declined to issue mandamus to the police, upholding the discretion of the police in enforcing the law. The relevant portion of the judgment of Lord Denning M.R., in that case reads as follows:

> "For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and

> give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But, there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than 100 pounds in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law." (Emphasis supplied)

Again in 1972, the same public spirited citizen Mr.Blackburn moved the court for a mandamus against the police to take effective action to enforce the law against the publication and sale of pornographic materials. The Police were given instructions not to institute prosecutions against the violation of the said law without the approval of the Director of Public Prosecutions. This resulted in large scale sale of pornographic literature without any interference from the police. In the said case the Court of Appeal found that the efforts of the police were ineffective because of the feebleness of the provisions of the Obscene Publications Act, 1959. So, it was held by the Court that the police were not failing in their duty and an order of mandamus was refused. {**R. v. Metropolitan Police Commissioner ex p. Blackburn (No.3)** [(1973)1 QB 241]}.

14. The facts of the next case we propose to refer, are identical to the facts of the present case before us. When the Electricity Generating Authority tried to survey a site for establishing an atomic power station, the

people of the locality obstructed the survey by holding demonstrations. The police declined to interfere, inter alia, on the ground that they did not want to mar their good relations with the local people. The Electricity Authority moved the Divisional Court for a mandamus to the police to remove obstructors. The Court dismissed the application. On appeal {**Reg. v. Chief Constable, Ex p. C.E.G.B.** - (1982)1 QB 458} the Court of Appeal also declined to issue a mandamus to the police to remove the protestors. The relevant portions of the said judgment read as follows:

> " LORD DENNING M.R.
>
> The coast of Cornwall is beautiful. Much of the inland is ugly. It is despoiled by china clay workings. Not far from them there is open farmland with small villages dotted around. Pleasant enough but not outstanding. The Central Electricity Generating Board view this as a possible site for a nuclear power station. They wish to survey it so as to compare it with other possible sites. The farmers objected to the survey. So did the villagers. They took up a stand against it. But on being told by the courts that it was unlawful for them to obstruct the survey, they desisted. They moved off the site. They obeyed the law. But then groups of outsiders came in from far and wide. They had no local connection with the place. They came anonymously. They would not disclose their identity. They would not give their name and addresses. They flouted the law. They wilfully obstructed the survey. Can these newcomers be moved off the site so that they obstruct no more? Can the board move them off? Or, if the board cannot do it, can the police be called in to help? The chief constable fees that he cannot use his force for the purpose. It would put his men in a bad light with the local inhabitants. What then is to be done?
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The board here acted throughout in complete accord with their statutory powers and obligations. They gave due notice to the farmers, Mr and Mrs. Searle, and sought their consent to the survey. It was not forthcoming. The board informed them of the statutory provision which authorised entry to their land. They gave them notice that they were coming on February 24, 1981. News of it got through to the television people and the newspapers. On February 24, 1981, three of the board's staff and three surveyors approached the site. They had written authority to enter. They found the way blocked by about 60 people, including Mr and Mrs.Searle and a group known as 'Luxulyan against Nuclear Development.' The television people were there. Also newspaper reporters. Five policemen were present. Two of them controlled the crowd and the traffic. The representatives of the board said to Mr.Searle: 'It is obvious that you do not intend to let us on the land.' Mr.Searle said: 'That is correct.' So the board's representatives withdrew to the boos of the crowd.

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On May 22, 1981, the board issued a writ against 32 named persons and on the same day Talbot, J granted an injunction against them. They too obeyed the injunction and moved off the site. They marched round the roads preceded, it is said, by the Lostwithiel Silver Band.

You might have thought that that would be the end of the matter: and that the rule of law had prevailed. But, no. Groups of interlopers then came from far and wide and tried to stop the work. One group, calling itself the Cornish Republican Movement, made an overnight attack on the drilling rig. Another group calling itself the Cornwall Anti-Nuclear Alliance started a systematic campaign of obstruction. They set up headquarters in a caravan. They had seven posts on the farm manned by 17 persons. They took up position in relays. As one party went off, another came on. And so forth. They called one another by their Christian names—Tom, Dick or Harry—or Susan, Mary or Jane—so that no one could discover their true names and addresses. Their organisers issued a leaflet giving instructions to volunteers who came to help them. I will quote part of it so that you

may see what they were told to do:

'Welcome. 1. It is peaceful and friendly—it must be kept that way—if at any time you feel unable to respond in such a way, please walk away from the situation.... 5. The drillers are basically friendly but have a job to do; be 'nice' but clear about why you are there.... 6..... (c) ..... If a rig gets inside the field lie down in front of it, but always warn the driver first (he cannot see in front of his wheels from the cab)..... Always explain to them that your actions are non-violent.... (f) Rig 1—If an attempt is made to move the drill into the field, two people must chain themselves to the rig. (You will be told where the keys are kept). No attempt can legally be made to manhandle you. Do not panic if the drillers arrive—they often come to service the machinery. 7. If you see a seismic team crossing onto the land, follow them. .... If possible put your foot (umbrella, portable windmill, etc.), under the hand-drill to stop a hole being drilled, or otherwise if you are too late for this—sit on the hole. .....10. Do not bring illegal substances onto the site or break the law in any way—it would only be an excuse for the C.E.G.B to call the police in and have us all removed.

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These newcomers made things so difficult for the board that they approached the police for help.

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The chief constable felt, however, that neither he nor his men could do anything to remove the demonstrators.

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Now, the board feel that they cannot ask their own staff, or the contractors' men, to turn these people off the site. They want the police to do it. The chief constable says 'No.' He thinks he has no lawful authority to do it. He also thinks that it would harm the relationship of his men to the public.

The board feel that the chief constable is mistaken. On July 8, 1981, they applied for an order of mandamus to compel him. It was

for:

'An order of mandamus directed to the Chief Constable of the Devon and Cornwall Constabulary requiring him to instruct police officers under his control to remove or assist the applicant's servants or agents to remove persons obstructing the applicant's works at Luxulyan in the County of Cornwall.

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I would add one further word. It is to my mind within the authority of the police to intervene to prevent any criminal offence being committed in their presence, even though it is only a summary offence, where the offender fails or refuses to give, or avoids giving, his name and address. Even though the statute does not give a power of arrest, the law says that a police officer can do whatever is necessary by way of restraint to prevent a criminal offence being committed or continued. So here the police would in my opinion be acting within the law if they cleared these obstructors off the site. If any resisted, or returned afterwards, the police would be entitled to take them before a justice of the peace who could require them to enter into a recognisance to be of good behaviour.

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Notwithstanding all that I have said, I would not give any orders to the chief constable or his men. It is of the first importance that the police should decide on their own responsibility what action should be taken in any particular situation. As I said in Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn [1968] 2 Q.B . 118, 136:

'.....it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on

such a matter. He can also make policy decisions and give effect to them, as for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere.'

The decision of the chief constable not to intervene in this case was a policy decision with which I think the courts should not interfere. All that I have done in this judgment is to give the 'definitive legal mandate' which he sought. It should enable him to reconsider their position. I hope he will decide to use his men to clear the obstructors off the site or at any rate help the board to do so.

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For the reasons I have given, however, I would make no order against the police. The appeal should be dismissed.

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LAWTON L.J.

This is not a case for making an order of mandamus against the chief constable. It is a case for co-operation between the board and the chief constable and the use of plenty of commonsense by all concerned, including those who are on the site obstructing the board's functions.

I would dismiss the appeal.

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TEMPLEMAN L.J.

The present litigation is due partly to the understandable desire of the police to be certain of the extent and limitations of their powers and partly to the understandable desire of the board to obtain the assistance of the police in the unpleasant task of removing and restraining the obstructors so that the board can complete their

> survey. The powers of the police and the board are adequate to ensure that the law prevails.
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> But it is for the police and the board to co-operate and to decide upon and implement the most effective method of dealing with the obstructors. The court cannot tell the police how and when their powers should be exercised, for the court cannot judge the explosiveness of the situation or deal with the individual problems which will arise as a result of the activities of the obstructors. This court can and does confirm that the police have powers to remove and arrest passive resisters in the circumstances which prevail at the site when the board resume their work to complete their survey. This court can and does indicate that the time has come for the board and the police to exercise their respective powers so that the survey may be completed." (Emphasis supplied)

15. Recently, the House of Lords in **R v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.** [(1999)1 All ER 129], upheld the decision of the Chief Constable not to extend protection for transport of livestock for export against the protests of animal lovers on all days. Owing to dearth of men, it was decided to restrict the protection to two days in a week. The House declined to interfere with the discretion exercised by the Chief Constable. The relevant portions of the speech of Lord Slynn of Hadley read as follows:

> "As a matter of domestic law, ITF's case in essence is that the chief constable had an overriding duty to make it possible for lawful activities to be carried out and that he could not lawfully allow the illegal acts of violent demonstrators to deflect him from that duty. Alternatively, if he had a discretion as to how he dealt with the problem then he failed adequately to take into account relevant matters and

gave too much weight to other matters, in any event his decisions in the letters of 10 and 24 April 1995 were those to which no chief constable could reasonably come.

My Lords, it is clear that, although the duty to keep the peace is that of the chief constable, what he does may be reviewed by the courts; if his act is clearly unlawful it will be quashed and he may be ordered to do something else; he may have to pay damages.

As I see it, however, a right of the kind claimed—here to trade lawfully—is not an absolute right by which the chief constable owes a duty to protect the trader at whatever cost and in whatever way necessary, any more than is the right to protest lawfully an absolute right owed by the chief constable to protestors which he must protect at whatever cost. If, for example, the police find a crowd of 500 demonstrators, half of whom are armed with offensive weapons and are clearly aggressive and half of whom are intending to protest peacefully, but the crowd is completely mixed, and the police reasonably conclude that the only way to prevent immediate breaches of the peace is to move the whole crowd away, it does not seem to me that the peaceful members could say that the chief constable is in breach of his duty to them by moving the whole crowd.

In a situation where there are conflicting rights and the police have a duty to uphold the law the policy may, in deciding what to do, have to balance a number of factors, not the least of which is the likelihood of a serious breach of the peace being committed. That balancing involves the exercise of judgment and discretion.

The courts have long made it clear that, though they will readily review the way in which decisions are reached, they will respect the margin of appreciation, or discretion, which a chief constable has. He knows, through his officers, the local situation, the availability of officers, his financial resources and the other demands on the police in the area at different times: Chief Constable of the North Wales Police v. Evans [1982]3 All ER 141 at 154, [1982]1 WLR 1155 at 1174. Where the use of limited resources has to be decided, the undesirability of the court stepping in too quickly was made very clear by Bingham MR in R v. Cambridge Health Authority, ex p B [1995]2 All

ER 129 at 137, [1995]1 WLR 898 at 906 and underlined by Kennedy LJ in the present case. In the former, Bingham MR said, in relation to the decisions which have to be taken by health authorities:

'Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.'

The facts here are different and the statutory obligations are different but, mutatis mutandis, the principle is relevant to the present case. It seems to me that it is the right principle and that, whilst the courts must be astute to condemn illegal acts by the police, yet, as was said by Balcombe LJ in Harris v. Sheffield United Football Club Ltd [1987]2 All ER 838 at 849, [1988]QB 77 at 95:

'The true rule, in my judgment, is as follows. In deciding how to exercise his public duty of enforcing the law, and of keeping the peace, a chief constable has a discretion, which he must exercise even-handedly. Provided he acts within his discretion, the courts will not interfere.... In exercising that discretion a chief constable must clearly have regard to the resources available to him....'

Here, although on occasions lorries got through with few demonstrators and a small number of police, it is plain that, particularly in the early months, there was no possibility of the lorries getting through without damage when large numbers of demonstrators were present. It seems that a large number of demonstrators genuinely objected on moral or physical grounds to these animals being taken to be dealt with on the continent even if they were carried in an acceptable way; it seems also that many of the demonstrators were likely to have acted, and to have intended to act, only in a peaceful and lawful way. There remained a hard core of people prepared to be, and who in fact were, violent to the lorries, the drivers and the police. The chief constable provided a large number of men at great cost in January but, in my view, he was entitled to consider whether, in all the circumstances, the use of so many officers and such costs were

justified on a continuing basis even without imposing a total ban on shipment. On the evidence it is clear that, in coming to his decisions, the chief constable took into account, in the present case: (a) the number of men available to him;(b) his financial resources to provide police officers; (c) the rights of others in his area and their protection; (d) the risk of injury during the demonstration to the drivers, to the police and to others, he took into account, no less, the competing rights of ITF to trade and of those who objected to the trade peacefully to demonstrate.

This approach, if there was evidence reasonably to support it, was, in my opinion, open to him.

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The chief constable gave evidence of the areas where other policing was required in accordance with the Home Secretary's and the police authority's policing objectives. It was his view that, although the 1994 figures in some cases were down on the statistics for 1993, the 1995 figures were an increase on 1994 both in relation to overall crime and to residential burglary, to crimes of violence and to vehicle crime. He attributed in part these increases to the 'disproportionately high level of policing which was allocated to the port between January and March 1995' (the chief constable's affidavit). There were fewer searches of premises to investigate crime (though not as few as he thought at the time) and the crime strategy in his view was adversely affected in other areas such as traffic control and training, in the maintenance of public order and in community assistance. In all these areas there was an adverse effect which he attributed in part to the police services he provided at Shoreham. Whether the precise figure was accurate does not matter, it is plain that his assessment was that policing in other areas was affected and that there was evidence to support this. It is not possible to say that this is something that he could not reasonably have taken into account in deciding the level of policing at Shoreham.

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I am satisfied, as was the Court of Appeal, that the chief

> constable has shown here that what he did in providing police assistance was proportionate to what was required. To protect the lorries, in the way he did, was a suitable and necessary way of dealing with potentially violent demonstrators. 'To limit the occasions when sufficient police could be made available was, in the light of the resources available to him to deal with immediate and forseeable events at the port, and at the same time to carry out all his other police duties, necessary and in no way disproportionate to the restrictions which were involved. ..... .
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> I am satisfied that here the chief constable has shown that the steps that he took were justified on grounds of public order and I would dismiss this appeal." (Emphasis supplied)

16. There is one decision of our Apex Court also, recognizing the operational freedom of the police. Before the days of "Blue Star operation", when Punjab was reeling under terrorism, it was common knowledge that in many places of worship terrorists were hiding with arms and the police was not taking steps to arrest them or recover the arms. In that context, a writ petition was filed before the Apex Court, seeking a mandamus to the police to enter such places of worship, whenever criminals are suspected to have taken shelter. The Apex Court in **Hindustani Andolan v. State of Punjab** [(1984 (1) SCC 204] declined to issue any mandamus. The said judgment reads as follows:

> "1. The question raised in this petition is whether the Government can ask the police not to enter a place of worship, even if criminals are reported to be hiding or harboured therein. It is impossible and undesirable for any court to issue a general writ of

> mandamus to the effect that whenever a criminal is suspected to have taken shelter in a place of worship, the police must enter that place, regardless of the overall situation of law and order. Speaking generally, courts cannot enforce law and order by issuing general directions without reference to specific instances. The Government has to assess, in the context of the prevailing conditions, the impact of the steps taken to enforce law and order. And, it is the executive which has to take a policy decision as regard the steps to be taken in a given situation, after taking into account the demands of the prevailing situation. We do not commend or suggest that the police should be silent spectators to wanton destruction of life but we cannot, as men of some little experience of law and life, commend that the police must enter places of worship forcibly. While enforcing law and order, the executive cannot be oblivious of the possibility that while solving one problem of law and order, others more acute than the one sought to be solved may arise. That is always a valid and relevant consideration.
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> 2. With these observations, we dismiss this petition filed by two public-spirited organisations through their courageous convenor and secretary respectively." (Emphasis supplied)

17. Since we have already held that the police have a duty to protect the property of the petitioner and the lives of its employees, we are not referring to the various decisions referred to by the learned senior counsel for the petitioner, in detail. As mentioned earlier, the only point that is to be considered is whether we should compel the police by issuing a writ of mandamus to use force to flush out the encroachers. The learned senior counsel pointed out that the number of people camping in the estate swelled to 5000, though the learned counsel for the respondents 7 and 8 would point

out that the number is depleting day by day and people are going away. Whatever be the exact number, it is common case that a few thousands have encroached into the property of the petitioner. So, we feel that the police should be given freedom to decide how to act and when to act to discharge their duty, which we have mentioned earlier. The District Collector, who is the District Magistrate in charge of the police force, shall also involve himself in the issue and try to evict the encroachers without unpleasant untoward incidents. We remind him that the District Magistrate has also got a duty in this regard, in the light of the relevant provisions in the Cr.P.C and the Police Act. So, the District Collector and the District Superintendent of Police should act in tandem and discharge their duty to the petitioner. The Government also cannot be a silent spectator. It is one of the primary duties of the Government to maintain law and order and protect the life and property of its citizens. It shall not appear that it is turning a blind eye towards lawlessness. The Government, therefore, shall extend a helping hand to the District Collector and the police to solve the stalemate. We are in respectful agreement with the decisions cited above, which say that the Court should not interfere with the operational freedom of the police. Further, having regard to the special facts of this case, we do not think it appropriate to set any strict time schedule for discharging their duty.

We hope and trust that they will discharge the same without inordinate delay. The Onam festival is at our door steps. It is a season which makes great demands on the men and resources of the police. From regulating traffic to preventing sale of illicit liquor, the police have to shoulder multifarious duties, so that the law abiding citizens are able to live in peace. The police have to discharge the duty they owe to the petitioner, after the Onam holidays. We hope they will do it within one month after the holidays. But, while discharging their duty, the police shall ensure that blood-shed and loss of life are averted. If the police fail to discharge their duty within a reasonable time limit, the petitioner can move this Court for appropriate further orders.

The Writ Petition is disposed of as above.

K.BALAKRISHNAN NAIR, JUDGE.

HARUN-UL-RASHID, JUDGE.

Nm/